No. 5718

United States
20
Circuit Court of Appeals

For the Ninth Circuit.

JOHN W. FELDER, MAURICE A. GALE, GEORGE SCHMIDT AND ROBERT GIERKE, Copartners, Doing Business as FELDER, GALE AND COMPANY,

Appellants,

vs.

H. W. REETH,

Appellee.

BRIEF FOR APPELLANTS.

UPON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE TERRITORY OF ALASKA, FOURTH DIVISION.

GEO. W. ALBRECHT,
CHAS. E. TAYLOR,
Attorneys for Appellants.

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BRIEF FOR APPELLANTS.

This is an appeal by the above-named appellants from a judgment rendered in the District Court for the Territory of Alaska, Fourth Judicial Division, on the tenth day of October, 1928, against the said appellants, who were the plaintiffs in the lower court, and in favor of the above-named appellee, H. W. Reeth, who was defendant therein, in an action brought by said appellants to recover the sum of $5,402.65 alleged by them and admitted by appellee to be due appellants on account of certain checks issued by said appellee and cashed by appel-

lants and for certain goods and merchandise sold and delivered to appellee by appellants, to which account the appellee filed a counterclaim for the sum of ten thousand dollars for certain matters arising out of a tort, and in which counterclaim appellee alleged that he waived the tort and elected to sue in contract.

STATEMENT OF THE CASE.

During the years 1919 and 1920, appellants were carrying on a general mercantile business at Bethel, on the Kuskokwim River in the Fourth Judicial Division of Alaska, the appellee being at such time engaged in mining operations on the Riglugalic River, a tributary of said Kuskokwim River, and about one hundred and fifty miles above Bethel. For the purpose of carrying on such mining operations, the appellee bought supplies and provisions from appellants, which were charged to his account at appellants store at Bethel. Appellee also from time to time paid off his employees with checks drawn on the Scandinavian Bank at Seattle, Washington, which checks, the appellants cashed at their store aforesaid, and thereafter forwarded such checks to Seattle for payment. These checks were returned by the Seattle bank to appellants, unpaid and marked "NO FUNDS."

The amount of goods and merchandise sold and checks cashed by appellants as aforesaid, aggregated the sum of $5,402.65, the particulars whereof are set out in the twenty-nine causes of action contained in the complaint in the lower court. Appellee

ceased his mining operations about the month of June, 1920.

During the year 1920, appellee caused to be shipped from San Francisco, Cal., certain hydraulic pipe and equipment, which was transported up the Kuskokwim and Riglugalic Rivers to a point about forty miles below the mining ground of appellee, and there unloaded and piled on the bank of the river, where it remained until the fall of the year 1921, apparently abandoned by appellee who was not then engaged in mining.

In the month of August, 1921, appellants were informed that the said pipe and equipment belonging to appellee was in danger of falling into the river by reason of the river having washed against and undermined the river bank at that place, and that some of such pipe was overhanging said bank and that unless prompt action was taken to prevent it, the same would fall into the river, and that no person was in the vicinity or looking after the said property.

That appellants, having in mind their account with appellee, thereupon sent up some men and removed the said pipe and equipment from said river bank to Bethel, Alaska, and notified appellee of what they had done, but heard nothing from appellee.

Appellants kept said pipe and equipment for two years and then sold the same for the sum of $550.00, which amount they credited upon the amount then due and owing from appellee.

That in October, 1923, appellants brought this suit in the lower court to recover the amount due them from appellee as shown by the twenty nine causes of action in the complaint. Appellee answered the said complaint, admitting all of the said causes of action, and set up a counterclaim alleging a tort by the appellants in taking and removing the said pipe and equipment without his consent and selling and disposing of the same. In his answer and counterclaim, appellee alleged that he waived the tort and elected to sue in contract for the value of the said property, which he then and there alleged to be the sum of three thousand dollars, being invoice price $1,955.00, plus cost of transportation $1,045.00. (See p. 48, Tr.)

A demurrer was interposed to this answer and counterclaim, which was by the lower court sustained, and an amended answer and counterclaim filed, which was upon motion, stricken from the files.

Appellee thereupon filed his second amended answer and counterclaim, admitting all of the allegations of the plaintiff's complaint, and setting up a counterclaim, alleging a tort by the appellants in removing and disposing of the said property without his consent, and alleging that he waived the tort and elected to sue in contract, and claimed the value of said property TO HIM to be ten thousand dollars.

Appellants demurred to this second amended answer and counterclaim, for the reason that the same sounded in tort and was not the proper subject of

a counterclaim under the laws of Alaska (see p. 64, Tr.), which said demurrer was by the Court overruled, whereupon appellants replied denying the allegations of the affirmative matter and counterclaim in said second amended answer and counterclaim.

The usual place of holding court within the Fourth Judicial Division of Alaska, is at Fairbanks, Alaska, about six hundred miles from Bethel, and owing to the great distance between the two places and the great inconvenience and expense that would necessarily be entailed in bringing witnesses from Bethel to Fairbanks to try the case, and the Judge being about to go to Bethel to hold a term of court there, it was stipulated between counsel for the respective parties, that the Judge should try the case at Bethel, but that neither side should be represented at the trial by counsel, and that they should argue the law of the case to the Court upon his return to Fairbanks. That under this stipulation, the case was tried at Bethel by the Judge, without a jury, and upon his return to Fairbanks, the matter was argued at length by counsel for both sides.

That after such argument, the Court made and filed his findings of fact and conclusions of law, in which he found as matters of fact:

1. That the defendant (appellee herein), became indebted to the plaintiffs (these appellants) upon the causes of action set forth in their complaint with accrued interest, in the sum of $8,690.21. (See p. 76, Tr.)

2. That the said defendant was the owner of certain hydraulic pipe and machinery (enumerating it), and that these appellants caused the same to be removed from the Riglugaric River to Bethel, Alaska, without the consent of appellee. That the action of the plaintiffs in taking the said machinery and disposing of it was without the knowledge or consent of the defendant, WAS UNLAWFUL, UNJUSTIFIABLE and OPPRESSIVE and resulted in compelling the defendant to abandon his mining enterprise at Golden Gate Falls. That under the circumstances and conditions as they existed at that time and place and by reason of the fact that there was no market value for said machinery at that time and place, and by reason of the use that the defendant could have put it to, the said machinery was worth TO HIM the sum of $8,000.00 and he is entitled to counterclaim that amount with interest at 8% per annum from Sept. 1, 1921, aggregating $12,480.00 as against the debt owing by him to the plaintiffs. And as conclusions of law the Court found that the said H. W. Reeth is entitled to recover from the plaintiffs (these appellants), the sum of $3,789.79 and the costs and disbursements of the action. To all of the matters of fact found by the Court in paragraph two of said findings and to the conclusions of law therein expressed, these appellants filed their objections and exceptions, which were by said Court overruled and exception allowed. (See p. 79, Tr.)

That plaintiffs also filed and presented to said Court their proposed findings of fact and conclu-

sions of law, wherein they requested the said Court to find that the defendants' alleged counterclaim is not one arising out of the contract set forth in plaintiff's complaint as the foundation of plaintiff's claim, nor is it one arising on contract, but is purely a right of action in tort, and is not allowable as a counterclaim under section 896 of the Compiled Laws of Alaska, or of any other law, and that the plaintiffs were entitled to judgment in the sum of $8,190.21 against the said H. W. Reeth; which said proposed findings and conclusions the court denied, to which decision the plaintiffs excepted and exception was allowed. (See p. 81, Tr.)

That thereafter, the plaintiffs filed their motion for a new trial of said action, alleging as reasons therefor, errors in law by admitting any evidence whatever to support the defendant's alleged counterclaim; insufficiency of the evidence to justify the judgment; error in law in pronouncing any judgment in favor of the defendant; which said motion for a new trial was overruled by the Court. (See p. 86, Tr.)

That thereafter the Court rendered its judgment in said action in favor of the said H. W. Reeth and against these appellants for the sum of $3,789.79 and the costs and disbursements of the said action, amounting to the sum of $30.95 (see p. 87, Tr.) from which said findings of fact and conclusions of law, order denying plaintiff's proposed findings of fact and conclusions of law, order denying motion for new trial and from said judgment, this appeal is taken. (See pp. 96 to 99, Tr.)

ASSIGNMENT OF ERRORS. (See p. 90, Tr.)

1. The Court erred in denying the plaintiff's motion to strike from the files the defendant's second amended answer and counterclaim, or in the alternative that the defendant be required to separate and plead the defenses therein contained, in the manner required by law, for the reason that the said second amended answer and counterclaim contains several defenses which are not properly stated.

2. The Court erred in overruling the plaintiff's demurrer to defendant's second amended answer and counterclaim for the following reasons:

(a) That this Court has no jurisdiction of the subject matter set up in said answer and counterclaim; it not being a proper subject of counterclaim under the laws of Alaska.

(b) That said second amended answer and counterclaim does not state facts sufficient to constitute a defense to the plaintiff's complaint.

3. The Court erred in overruling paragraph 2 of plaintiff's objections to defendant's proposed findings of fact and conclusions of law, wherein they objected to the whole of paragraph 2 of said proposed findings of fact because the said paragraph 2 of said proposed findings of fact is intended to support the defendant's alleged counterclaim, which did not arise out of the contract or transaction set forth in plaintiff's complaint; nor is it one arising on contract, but is purely a right of action in tort, and not allowable as a counterclaim under the laws of Alaska.

4. The Court erred in finding as a fact the following statement contained in paragraph 2 of the findings of fact and conclusions of law filed herein, commencing at paragraph 2 thereof, as follows:

> "That prior to August, 1921, the defendant became the owner by location and purchase of contiguous placer mining claims of an area of about 1200 acres located at Golden Gate Falls, on the Riglugalic River, a tributary of the Kuskokwim River in the said Division and Territory, and up to that time had prepared the same for hydraulic mining by the construction of cabins, machine shops and other buildings, digging ditches, placing a dam across said river and clearing the ground of brush and was ready to commence open cut hydraulic mining thereon."

for the reason that the same is irrelevant and immaterial, and is inserted as a foundation for damages in tort, which tort the said defendant has expressly waived in his answer aforesaid.

5. The Court erred in finding as a fact the following statement contained in said paragraph 2 of the findings of fact aforesaid, commencing at the middle of line 18 thereof on page 3, and including the words "and in charge of a native Indian," for the reason that such finding is not supported by any evidence whatever, and is inserted as a further foundation for damages in tort.

6. The Court erred in finding as a fact that portion of section 2 of such findings, commencing on line 19 at page 3 thereof with the words

> "That in August, 1921, the plaintiffs employed one Tony Sumi to proceed with a power boat from Bethel to the said Supply Camp on the Riglugalic River and load the said machinery thereon and return it to Bethel, which the said Tony Sumi did, and delivered the same to these plaintiffs who afterwards sold the same and kept the proceeds. That the action of the plaintiffs in taking the said machinery and disposing of it was without the knowledge or consent of the defendant, was unlawful, unjustifiable and oppressive and resulted in compeling the defendant to abandon his mining enterprise at Golden Gate Falls."

for the reason that such allegation is inserted as a further foundation for damages in tort, and that such tort is not a proper counterclaim to the plaintiff's complaint.

7. That the Court erred in refusing to find as a fact the plaintiff's proposed finding of fact No. 6 as set out in said proposed findings, as follows:

> "6. That the plaintiffs, in the fall of 1921, for the purpose of saving the same from being lost through falling into the Riglugalic River, took possession of a quantity of hydraulic pipe and other mining equipment, the property of the defendant, and held the same for about two years and then disposed of all of the property for the sum of five hundred and fifty dollars ($550.00), which amount the plaintiff's credited in account to the defendant."

for the reason that such allegation is a material fact and is supported by the evidence.

8. The Court erred in finding as a fact that certain allegation contained in paragraph 2 of the said findings of fact, commencing on line 29 of page 3 thereof, and continuing as follows:

> "That under the circumstances and conditions as they existed at that time and that by reason of the fact that there was no market value for the said machinery at that time and place, and by reason of the use that the defendant could have put it to, the said machinery was worth to him the sum of $8,000.00."

for the reason that the said finding is inserted as a further basis and foundation for damages in tort, and that such tort is not a proper counterclaim to plaintiff's complaint.

9. The Court erred in finding as a fact that certain allegation commencing on line 34 of page 3 of said findings of fact and conclusions of law aforesaid, and continuing as follows:

> "and he is entitled to counterclaim that amount with interest thereon at 8% per annum from September 1, 1921, as against the debt owing by him to plaintiffs."

for the reason that such damages sound in tort and are not a proper counterclaim to plaintiff's complaint, and that such allegation is a conclusion of law.

10. That the Court erred in concluding as a matter of law that the defendant H. W. Reeth is en-

titled to recover of and from the plaintiffs the sum of $3,789.79 and the costs and disbursements of the action, for the reason that such conclusion is not warranted or sustained by the facts of the case, and that such amount is not a proper counterclaim against plaintiff's complaint, nor did it arise out of the same transaction sued upon by plaintiffs.

11. The Court erred in overruling the plaintiff's objections to said conclusions of law as set forth in paragraph 3 of "plaintiff's objections to defendant's proposed findings of fact and conclusions of law," and which proposed findings and conclusions were thereafter adopted by the Court as the findings of this case.

12. The Court erred in refusing to allow and adopt paragraph 1 of plaintiff's proposed conclusions of law, as follows:

> "That the defendant's alleged counterclaim is not one arising out of contract or transactions set forth in the complaint as the foundation of the plaintiff's claim; nor is it one arising on contract, but is purely a right of action in tort and is not allowable as a counterclaim under Sec. 896 of the Compiled Laws of Alaska, or any other law."

for the reason that such proposed conclusion is the proper law governing this action.

13. The Court erred in refusing to allow and adopt paragraph 2 of the plaintiff's proposed conclusions of law, as follows:

> "That taking into consideration the plaintiff's 28 causes of action, and the credit set forth in plaintiff's reply, together with interest thereon, there is now due and owing from the defendant to plaintiffs the sum of eight thousand one hundred and ninety dollars and twenty-one cents ($8,190.21) and that the plaintiffs are entitled to a judgment against the defendant for said sum and for their costs and disbursements of this action."

for the reason that such conclusion of law is fully borne out by the pleadings, the evidence and is the proper law governing the case.

14. The Court erred in giving and entering judgment against the plaintiffs in this action, for the reason that the facts alleged in plaintiff's complaint are admitted by the defendant; that the counterclaim set out in defendant's second amended answer and counterclaim did not grow or arise out of the same transaction, but is for damages in tort, and is not a proper subject of counterclaim under the laws of Alaska.

15. The Court erred in overruling plaintiff's motion for a new trial for the reason that the pleadings in said action and the evidence adduced thereon and admitted by the Court to sustain the counterclaim of the defendant was not sufficient to justify a judgment in favor of the defendant, and that such judgment was erroneous in law as well as in fact. (See pp. 90, to 96, Tr).

POINTS.

1. Under the laws of Alaska an independent, disconnected, separate tort, not forming a part of the transaction sued upon as the basis of plaintiff's cause of action, or connected with the subject of the action, cannot be made the basis of a counterclaim.

2. That the cause of action submitted by the defendant as a counterclaim in this action, did not arise out of the contract or transaction set forth in plaintiff's complaint as the foundation of plaintiff's claim; nor did it arise out of any contract whatsoever, but is founded purely in tort, and is therefore not a proper subject of counterclaim under the laws of Alaska.

3. Supposing, but not conceding, that one could, by electing to waive a tort and rely upon an implied contract, so as to bring his case within the provisions of the statute of Alaska relating to counterclaims, the mere allegation of a waiver of tort by the pleader is not alone sufficient for that purpose. He must abandon the idea of an action in tort and frame his pleadings under the rule of actions *ex-contractu.*

4. Defendants alleged counterclaim is framed as an action in tort; notwithstanding his alleged waiver, he lays the foundation for damages in tort, from start to finish. His work for two years previous to the alleged tort; his forced abandonment of his mining venture; his allegation that plaintiff's

acts were wrongfully and unlawfully done and that the value of the property taken was of the REASONABLE VALUE TO HIM of ten thousand dollars. The pleading is so drawn as to veritably shriek in tort.

5. The mere allegation by the pleader that he waives the tort and elects to rely upon an implied contract has the effect only of an election of remedies, and if his pleading is drawn so as to otherwise sound in tort, it is bad upon demurrer.

6. If the counterclaim of the defendant could in any way be considered as arising out of contract, either express or implied, the measure of his recovery under the rule of contract, should be either for money had and received for his benefit, that being the amount that the plaintiff benefited by the transaction, or, at most, the cost of replacement of the property. Any greater measure of value or damages would sound in tort, and the tort is not a proper subject of counterclaim in an action on contract under the law of Alaska.

7. Where in an action on contract, defendants attempts to set up conversion and sale of goods, and, waiving the tort, elects to rely upon implied assumpsit for the value of the goods, the measure of recovery awarded to the defendant was the value of the goods TO HIM, without any reference to the cost of reproduction or replacement of the goods, or the market value thereof, the award to the defendant sounds in tort and not in contract.

8. In conversion and sale of goods, where the tort is alleged to be waived and pleader relies on

implied contract for the value of the goods, a finding of fact by the Court "that the acts of the plaintiff in taking the goods were unlawful, unjustifiable and oppressive and resulted in compelling the defendant to abandon his mining enterprise," sounds in tort, and conclusively shows that the Court viewed and considered the action as in tort and not in contract, and that the tort formed the basis and measure of compensation awarded to the defendant.

9. Where defendant, in an action on contract sets up as a counterclaim, a conversion and sale of goods by the plaintiff, and alleges that he waives the tort and elects to rely upon the implied contract to pay the value of the goods, and that the goods are of A REASONABLE VALUE TO HIM of ten thousand dollars, the allegation as to the value of the goods sounds in tort and not in contract and the demurrer of the plaintiff to said counterclaim should have been sustained.

10. Unliquidated damages arising out of tort cannot be pleaded as a counterclaim in an action brought on contract, even where the tort is waived and an action in *assumpsit* relied upon.

11. The pleadings of the defendant, the rulings of the Court in overruling plaintiff's demurrer thereto, the findings of fact and conclusions of law adopted by the Court and the judgment rendered, all show conclusively that the defendants' case was tried and considered upon the rules and principles governing actions in tort and not upon the rules and principles governing actions in contract, and as so considered, the defendant's case was not a

proper subject of counterclaim under the laws of Alaska.

ARGUMENT.

FIRST ASSIGNMENT OF ERROR.

The Court erred in refusing to strike the defendant's second amended answer and counterclaim, for the reason that the same contains several defenses which are not properly stated, or in the alternative that the defendant be required to state them separately.

A mere perusal of the pleading will disclose the objections to it but inasmuch as only one of the defenses therein stated was considered by the Court in its findings of fact and judgment, this assignment of error is not now seriously urged.

SECOND ASSIGNMENT OF ERROR.

The Court erred in overruling plaintiff's demurrer to defendant's second amended answer and counterclaim, for the reasons,

(a) That the Court has no jurisdiction of the subject matter set up in said pleading because it is not a proper subject of counterclaim under the laws of Alaska.

(b) That the said answer and counterclaim does not state facts sufficient to constitute a defense to plaintiff's complaint.

The subject of counterclaim in Alaska is governed by the provisions of Secs. 895 and 896 of the Compiled Laws of Alaska and are as follows:

Sec. 895.—The answer of the defendants shall contain, First. A general or specific denial of each material allegation of the complaint, controverted by the defendant, or of any knowledge or information thereof, sufficient to form a belief. Second. A statement of any new matter constituting a defense or counterclaim in ordinary and concise language, without repetition.

Sec. 896. The counterclaim mentioned in the last preceding section must be one existing in favor of the defendant and against a plaintiff, between whom a several judgment might be had in the action, and arising out of the following causes of action: First. A cause of action arising out of the contract or transaction set forth in the complaint as the foundation of plaintiff's claim. Second. In an action arising on contract, or any other cause of action arising also on contract, and existing at the commencement of the action. The defendant may set forth by answer as many defenses and counterclaims as he may have. They shall each be separately stated, and refer to the causes of action which they are intended to answer in such manner that they may be intelligibly distinguished.

Sections 895 and 896 of the Compiled Laws of Alaska were originally taken and adopted from the statutes of Oregon, and are identical with Sec. 73 of Lord's Oregon Laws, and the construction of such statute by the Oregon Supreme Court, at the time of such adoption, if such can be found should be controlling in Alaska.

It must be at once conceded that the counterclaim set up by the defendant in this action is not one arising out of the contract or transaction set forth in the complaint as the foundation of the plaintiff's claim; therefore it cannot be considered under the first subdivision of the foregoing statute.

And that to bring it under the second subdivision of Section 896, the counterclaim must arise out of CONTRACT.

Defendant has attempted to bring his second amended counterclaim within the provisions of the second subdivision of the foregoing section 896, by an express allegation "that he waives the tort and elects to rely upon an implied contract upon the part of the plaintiffs, created by law to pay him the sum of ten thousand dollars for said machinery and equipment, the the same being the *reasonable value thereof;*" although in his original answer and counterclaim he alleged that the invoice price of the property to be $1,955.00 and freight charges $1,045.00; alleging a total value of the property to be $3,000.00.

While we fully recognize the rule of law that will entitle one in a proper case, to waive a tort and sue upon an implied contract, yet we do not concede any rule which will permit one to allege that he waives the tort and elects to sue in contract, and then set up as a counterclaim a cause of action arising in tort, sounding in tort and not arising out of the same transaction set forth in plaintiff's complaint as the foundation of the plaintiff's claim, but seeks to recover damages as in a tort action.

In 1897, the Supreme Court of Oregon, in the case of Ziegler vs. McClellan, 16 Pac. 179, decided that a tort cannot be pleaded as a counterclaim in an action on contract, unless it constitutes a breach of the contract. And again in 1889, in the case of Lowenburg et al. vs. Rosenthal et al., 22 Pac. 601, the same Court, speaking through Chief Justice Thayer, says:

> "I am unable to understand how a counterclaim can arise out of a transaction which constitutes the foundation of a claim for damages for a trespass, under the section of the Code above referred to. It certainly is not provided for in the Second sub-division of said section, as that applies wholly to contracts.

and the doctrine thus announced is still in full force in Oregon.

Miser vs. O'shea, 37 Or. 231, 62 Pac. 491;
Title G. & Abst. Co. vs. Nashburg, 58 Or. 190, 113 Pac. 2;
Casner vs. Hoskins, 64 Or. 254, 128 Pac. 841;
Chamberlain vs. Townsend, 72 Or. 207, 142 Pac. 782;
McGarger vs. Wiley (Or.), 229 Pac. 665;
Town of Eagle Point vs. Hanscom (Or.), 252 Pac. 399;
Krausse vs. Greenfield (Or.), 123 Pac. 393, see point 6;

and should be controlling in Alaska. The courts of Alaska have not heretofore been called upon to adjudicate this question.

So that in order to bring the defendants attempted counterclaim within the second subdivision of the Alaska statute, we must look for some form of contract between the parties, either express or implied.

Of course, we recognize and concede the rule to be in some jurisdictions, that if any party may sue either in tort or *assumpsit,* and he elects to waive the tort and rely on *assumpsit,* such a cause of action may be used as a counterclaim, upon the theory of implied contract, but in view of the language of the Oregon court we cannot concede it to be the law of Alaska. The question of the waiver of tort to bring the case within the counterclaim statute is an open question so far as Alaska is concerned. We are therefore confronted by two questions; First, what is the nature of the contract thus implied by the waiver of the tort in this jurisdiction? Second. Has the defendant, by his pleading, brought himself within the rule so as to sustain his cause of action as a counterclaim under the Alaska law? As to the first question, the rulings of the Courts are many and varied. Many courts hold that waiver of tort and suit in *assumpsit* will not be allowed unless the property taken has been converted into cash or its equivalent, and that the action must be for money had and received, upon the theory that the owner waives the wrongful taking, adopts the wrongdoer as his agent and ratifies the sale as made for his use and benefit.

Other courts have extended the doctrine so as to include cases where no sale was made, but the prop-

erty converted to the use of the wrongdoer, and have permitted the owner to waive the tort and sue in *assumpsit* for the value of the property upon the theory of an implied sale to the wrongdoer.

If there is an express contract, and the same act or transaction constitutes both a tort and a breach of contract, the injured party may waive the tort and sue on the contract.

1 Corpus Juris, pages 1030 to 1034 and notes.
Cooley on Torts, Secs. 109–111.
Addison on Torts, Wood's Ed., Sec. 52.

In 2 R. C. L., at page 755, the rule is thus stated:

> "The most frequent application of the doctrine of waiving the tort and suing in *assumpsit* is to be found where the cause of action is based on the conversion of personal property. In such case the rule is that where the tortfeasor has derived a benefit from the conversion, the owner may waive the tort and proceed against the wrongdoer in an action of *assumpsit* for the full value of the property converted."

and cites numerous cases under note 12 to support the statement.

We at once concede the rule as stated, except as to the measure of recovery; after an examination of the cases cited we are unable to agree that they sustain such a broad statement, but rather inclining to the classes heretofore announced, according to the nature of the particular case.

We urge, however, that the measure of recovery should be according to the benefits of the transaction received by the wrongdoer.

Addison on Torts Wood's Ed., Sec. 52.
Cooley on Torts, 107–111.
Downs vs. Finnegan (Minn.), 59 N. W. 981.
Challis vs. Wylie (Kan.), 11 Pac. 438.
Fanson vs. Lindley, 20 Kan. 235.
Farmers & M. Bank vs. Huckaby (Okl.), 215 Pac. 429.
2 R. C. L., page 761, Sec. 20.

This rule is stated by Mr. Addison in his treatise on the law of torts, as follows:

> "If a man has taken possession of property and sold or disposed of it without lawful authority, the owner may either disaffirm his act and treat him as a wrongdoer, and sue him for a trespass or conversion of the property, or he may affirm his acts and treat him as his agent, and claim the benefit of the transaction; and if he once has affirmed his acts and treated him as an agent, he cannot afterward treat him as a wrongdoer, nor can he affirm his acts in part and avoid them as to the rest."

Addison on Torts, Wood's Ed., Sec. 52.

To the same effect is Cooley on Torts, 107–111.

In Downs vs. Finnegan, reported in 59 N. W. 981, the Supreme Court of Minnesota, in 1894, says:

> "There seems to be no difference of opinion upon the proposition that a mere naked tres-

> pass, although creating a liability for damages, cannot be the basis of implied *assumpsit;* ITS BASIS IS THE BENEFIT WHICH THE WRONGDOER HAS RECEIVED.

And in Fanson vs. Linsley 20 Kan. 235, the Supreme Court of Kansas said:

> "Whenever one person commits a wrong or tort against the estate of another, with the intention of benefiting his own estate, the law will, at the election of the party injured, imply or presume a contract on the part of the wrongdoer to pay to the party injured the full value of all benefits resulting to the wrongdoer."

and this language was reiterated by the same Court in the cases of

> Challis vs. Wylie (Kan.), 11 Pac. 438;
> Atchison T. & S. F. R. Co. vs. Phelps (Kan.), 46 Pac. 183;

and adopted by the Supreme Court of Oklahoma in 1923, in the case of

> Farmers & Mer. Nat. Bk. of Hobart vs. Huckaby, 215 Pac. 429.

It would seem that up to the time of the adoption of the statutes of Oregon by Alaska (1884), the Supreme Court of Oregon had not expressed itself upon this question, nor has the Alaska court heretofore had an occasion to consider it.

We earnestly contend that in case of a waiver of tort and election to sue in *assumpsit,* the amount of recovery should be measured by the benefits re-

ceived by the tort-feasor; if the owner of the property is not satisfied with that, he is not compelled to waive the tort, but can sue in tort and demand the full measure of damages which an action in tort might entitle him to.

If, as in the instant case, the defendant alleges a sale of his property by the plaintiff, and he waives the tort and relies upon the implied *assumpsit,* his recovery should be the amount received by the plaintiff and the action for money had and received for his benefit. And this, he has already received.

> La Grande Nat. Bank vs. Oliver (Or.), 165 Pac. 682.
>
> Southern Ry. Co. vs. Born Steel Range Co. (Ga.), 50 S. E. 488.

As to the second question.

Defendant, in his second amended answer and counterclaim alleges: That he was the owner of certain personal property (describing it), which was *reasonably worth* and of the value TO HIM of $10,000.00. (See par. 2.)

That the plaintiff wrongfully and unlawfully took possession of said property and converted the same to their own use, and sold part, if not all of it. (See Par. 3.)

That he elects to waive the tort and rely upon the implied contract created by law, to pay him the sum of ten thousand dollars, the same being the REASONABLE VALUE of said property. (See par. 4.)

> "Where one waives a tort and sues in contract, he makes a binding election of remedies

which cannot be reconsidered * * * * and he cannot thereafter treat the action as if it were a tort action. He may pursue either remedy, but not both."

1 C. J., page 1039, Sec. 169, notes 41–43.
2 R. C. L., page 754, note 2.
Jones vs. Winsor, 118 N. W. 716.
Fowler vs. Bowery, Savings Bank, 4 L. R. A. 145.

And in such a case the action is governed by the rules and principles applicable to actions *ex contractu,* as regards the venue of the action, the statute of limitations, * * * * the form of judgment and the MEASURE OF DAMAGES.

1 C. J., 1040, Sec. 169, notes 52 to 57.
Lubert vs. Chauviteau, 3 Cal. 458.
Union Pac. R. Co. vs. Shook (Kan.), 44 Pac. 685.
Penn. R. R. Co. vs. Smith (Va.), 56 S. E. 567.
Hutchinson vs. Phillips (Ark.), 11 Ark. 270.

So having elected to waive the tort and sue in *assumpsit,* the defendant should frame his pleadings on the theory of *assumpsit,* and on that theory alone, and if the facts alleged do not show a cause of action in contract, the complaint is bad on demurrer.

Woodruff vs. Zaban (Ga.), 65 S. E. 123.
Braitwaite vs. Akin, 56 N. W. 133.
Miller vs. Hirshberg (Or.), 40 Pac. 506.

"Whether an action is in contract or in tort must be determined by the pleadings and by an examination and construction of the essential allegations of the same, rather than the form adopted by the pleader, and the question must be determined with reference to the pleading as a whole, and not by the particular words and allegations considered apart from the context. THE PRAYER FOR RELIEF and the MEASURE AND AMOUNT OF RECOVERY sought is an important consideration."

1 C. J., page 1015, Sec. 138, notes 31–36.

Gentry vs. Purcell, 84 Ind. 83.

Donough vs. Dillingham, 43 Hun (N. Y.), 493, 496.

Carter vs. White, 32 Ill. 509.

Holt Ice Co. vs. Jordan (Ind.), 57 N. E. 575.

Ft. Smith & W. R. Co. vs. Ford (Okl.), 126 Pac. 745.

1 C. J., page 1039, Sec. 168, notes 34–5–6.

Smith vs. McCarthy (Kan.), 18 Pac. 204.

Pennoyer vs. People, 105 Ill. 481.

Atchison T. & S. Co. vs. Long (Kan.), 47 Pac. 993.

31 Cyc. 110–111.

Nation vs. Planters Bank (Okl.), 119 Pac. 977.

Johnson vs. Cummings (Colo.), 55 Pac. 269.

Abraham vs. State (Okl.), 244 Pac. 741.

Unliquidated damages arising out of tort cannot be pleaded as a counterclaim in an action brought

on contract, and plaintiffs contend that the measure of damages claimed by the defendant is unliquidated damages, notwithstanding his waiver of tort.

> "If the action is such that unliquidated damages are to be assessed at the discretion of the jury, generally set-off cannot as a rule be pleaded"
>
> 24 R. C. L., page 810, Sec. 17, note 13.
> Lubert vs. Chauviteau, 3 Cal. 458.
> Burrage et al., vs. Bonanza Mng. Co. (Or.), 6 Pac. 766.
>
> "It is the well settled general rule that neither at law nor in equity can unliquidated damages be made the subject of a set-off, but only claims whose amount is ascertained or ascertainable by calculation, and which needs no proof except of the liability."
>
> 24 R. C. L., pages 855, 856, Sec. 59, note 4.
> Note to Helwig vs. Laschowski, 10 L. R. A. 378.
> The Zouave, 29 Fed. 296.

In Southern Ry. Co. vs. Born Steel Range Co., *supra,* the Georgia Supreme Court says:

> "The gravamen of the plaintiff's complaint is that there had been a conversion of the property. * * * * It is a well settled rule that a tort may be waived and that the aggrieved party may sue in *assumpsit,* where there has been a sale of the property converted; the action being for money had and received to

> the plaintiff's use; but where the property has not been converted into money and a suit is instituted to recover the property or its value, the action is *ex-delicto* and not *ex-contractu,* and the aggrieved party is restricted to this

form of action, citing Cragg vs. Arendale, 113 Ga. 181, 38 S. E. 399.

To the same effect is Whilden vs. Merchants and Planters Bank, 38 Am. Rep. 1.

It has also been said that the right to waive a tort and sue in *assumpsit* will not be indulged where the effect of it would be to give jurisdiction over the subject matter to a Court which otherwise would not possess it, or which would bring a case within the terms of a statute which otherwise would not include it.

> 2 R. C. L., page 755, Sec. 14, note 11.
> 1 C. J., page 1033, Sec. 158, note 21.
> Ahern vs. Carroll, 30 Mo. 200.
> Webb vs. Tweedie, 30 Mo. 488.
> Finley vs. Bryson, 84 Mo. 664.
> Elliot vs. Jackson, 3 Wis. 649.
> Dougherty vs. Chapman, 29 Mo. 233.
> Sandeen vs. Kansas C. R. Co., 79 Mo. 278.

Notwithstanding his alleged waiver of tort, the defendant's pleading is not framed otherwise than in tort; he claims as a measure of damages a fictitious value of the property alleged to have been converted; a value TO HIM; not the real value; not the market value; not the amount received for it by plaintiffs, but an arbitrary value to him; in

other words, DAMAGES; and his alleged waiver of tort is meaningless, except as an election which obliges him to rely on the rule governing actions *ex contractu;* but he leaves his pleading sounding in tort and not in contract; and therefore his pleading, sounding in tort, and not framed as an action *ex contractu* is not allowable as a counterclaim under the laws of Alaska. That plaintiffs, having demurred thereto, such demurrer should have been sustained.

Findings of fact based upon allegation or tort and sounding in tort cannot be made the basis of recovery in action *ex contractu.*

ASSIGNMENTS OF ERROR Nos. 3, 4, 5 and 6.

Assignments of error Nos. 3, 4, 5 and 6 go to paragraph two of the defendants' proposed findings of fact and conclusions of law (which said paragraph was adopted by the Court), because the allegations of said paragraph are intended to and do support the defendant's alleged counterclaim, which did not arise out of any contract nor out of the transaction set forth in plaintiff's complaint, but is purely a right of action in tort, and not such a counterclaim as was contemplated under the laws of Alaska. These assignments may be considered together.

The language in said paragraph objected to is as follows:

> "That prior to August, 1921, the defendants became the owner by location and purchase of contiguous placer mining claims of an area of about 1200 acres located at Golden Gate Falls

on the Riglugaric River, a tributary of the Kuskokwim River, in the said Division and Territory, and up to that time had prepared the same for hydraulic mining by the construction of cabins, machine shops and other buildings, digging ditches, placing a dam across said river and clearing the ground of brush and was ready to commence open cut hydraulic mining thereon."

This language was contained in the defendant's second amended answer, and was objected to by plaintiff's motion to strike the same as irrelevant and redundant, but the same was allowed by the Court to stand. We can see no reason for such language in the pleading except as a basis or measure of damages, and must have been included in the Court's findings for the same reason,—the fixing of a measure of damages in tort, a penalty for taking the property, and had no place in an action for the payment of goods, or the replacement thereof; the goods were not taken from said place nor anywhere near it, and what the defendant had done years before had no bearing on the value of mining material which had not yet reached its destination. The goods cost $3,000.00, including freight charges at the place from where they were taken, according to defendant's original answer, and could have been replaced for the same figure; and the language of the Court in such finding is objected to as laying a foundation for damages in tort and has nothing to do with any contract, implied or otherwise, to pay for anything. The paragraph continues:

"That in 1919, the defendant purchased in San Francisco, California, a hydraulic mining plant consisting of

600 Ft. 12″ pipe
200 Ft. 8″ pipe
3 10″ 90 deg elbows
1 10″ to 8″ outlet
2 Reflectors
2 20 ft. gravel elevator
6 tops of baskets
400 Ft. 10″ pipe
3 8″–90 deg elbows
1 12″ to 10″ reducer
2 No. 1 Giants
1 Stat. Fairbanks-Morse 3 H. P. Gas engine
5 wheel-barrows
2 bars 7/8 inch drill steel

and in the summer of 1920 caused the same to be shipped from San Francisco, California, to Bethel, Alaska, and from there it was started to his mining ground at Golden Gate Falls on said Rigugaric River, but owing to high water the boat transporting the same was unable, by reason of the swift current to get farther than a point called 'supply point,' on the said river, which is about forty miles down river from said Golden Gate Falls, and at that point the said machinery was taken from the boat and put on the bank and placed in a tent in charge of a native Indian." (See Assignment No. 5.)

Ordinarily, we would consider this language immaterial and irrelevant; like the first part of said

paragraph two, it was included in defendant's pleading and objected to by plaintiffs, but was allowed to stand if it was considered pertinent, then its object must necessarily be to go to the measure of damages, something to intensify the wrong of plaintiff in taking the same, and therefore sounds in tort and not in contract; there is nothing in said finding as to the cost of the property; nothing as to the invoice price; nothing as to freight charges; nothing as to market price; nothing as to cost of replacement; and what happened in 1920 as to placing the property in charge of a native Indian, if such a thing did happen (although there was nothing whatever about that in the testimony), is entirely immaterial and can have no bearing in fixing the value of property in an action *ex contractu.*

Continuing said paragraph 2—

> "That in August, 1921, the plaintiffs employed one Tony Sumi to proceed with a power boat from Bethel to the said 'Supply Point' on the Rigugaric River and load the said machinery thereon and return it to Bethel which the said Tony Sumi did and delivered the same to these plaintiffs who afterwards sold the same and kept the proceeds. That the action of the plaintiffs in taking the said machinery and disposing of it was without the knowledge or consent of the defendant, was unlawful, unjustifiable and oppressive and resulted in compelling the defendant to abandon his mining enterprize at Golden Gate Falls." (See assignment of error No. 6.)

The effect of this language is to accentuate the wrong of the plaintiffs (if wrong there is). This language does not show that any tort was waived; in fact, nowhere in the Court's findings of fact or in the judgment is it shown that any tort was waived. The language shows conclusively that the findings of fact is based upon tort and not upon contract; nowhere in the whole case, except in plaintiff's pleading is it shown that any tort was waived; the findings as well as the judgment shows that the defendant's case has proceeded and has been considered as an action in tort, and as such, is not a proper subject of counterclaim in Alaska.

Again it is submitted that where a tort is waived and an action brought upon an implied contract, the case should be governed by the rules and principles applicable to actions on contract, including the amount and measure of damages.

1 C. J., page 1040, Sec. 169, note 57.

Plaintiffs earnestly contend that no wrong was done by them; it is admitted by the defendant that he owed plaintiffs between five and six thousand dollars; that the account had been outstanding for three years; that the pipe had been lying on that river bank for nearly two years; that it was in danger of being lost to everybody and was removed by plaintiffs to save it; that it had been abandoned by the defendant; that plaintiffs sold it and applied the whole of the proceeds of such sale to the credit of the defendant. And the Court erred in refusing to find as a fact, plaintiff's proposed finding No. 6, which was as follows:

"No. 6. That the plaintiffs in the fall of 1921, for the purpose of saving the same from being lost through falling into the Riglugaric River, took possession of a quantity of hydraulic pipe and other mining equipment, the property of defendant, and held the same for about two years and then disposed of all of said property for the sum of five hundred and fifty dollars, which amount the plaintiffs credited to the account of the defendant."

In actions of tort, it is said that no defense will avail which goes, not to the gist of the action, but to incidental matters of excuse, benefits and damages.

38 Cyc., 2059, note 59 and cases cited.

This is the general rule in tort actions, and is probably what the Court had in mind when it refused to consider the matters and things set up in plaintiff's reply, and is but another proof that the Court considered and treated the defendant's answer and counterclaim as an action in tort.

ASSIGNMENT OF ERROR No. 8.

The Court erred in finding as a fact, that portion of paragraph two of said findings of fact, commencing on line 29 of page 3 thereof (being a continuation of said paragraph from the last portion objected to), as follows:

"That under the circumstances and conditions as they existed at that time and by reason of the fact that *there was no market value for said machinery at that time and place, and by*

> *reason of the use that the defendant could have put it to,* the said machinery was worth *to him* the sum of $8,000.00.

for the reason that the said finding of fact is inserted as a further basis and foundation for damages *in tort* and NOT IN CONTRACT, and is not a proper counterclaim to the plaintiff's complaint under Sec. 896 of the Compiled Laws of Alaska.

> "In trover, the measure of damages is the fair, reasonable value of the property converted, which will be presumed to be either what it was worth on the market, irrespective of the price paid for it, or the AMOUNT IT WAS SUBSEQUENTLY SOLD FOR, or what it was actually worth if it had no market value, and where an article has little or no value, and is of special value to the owner, he may recover that."
>
> 38 Cyc., 2092, 2093, notes 56, 57, 58, 59.
>
> "In Contract, damages which are uncertain, contingent or speculative in their nature cannot be made the basis of recovery. This rule is applicable to actions on contract."
>
> 17 C. J., page 753, Sec. 68, notes 46, 47, and many cases cited.

Can there be any doubt as to what was in the Court's mind when he found what amounted to damages in the sum of $8,000.00 for the defendant, when he used the language "In view of the circumstances and conditions existing at that time, and by reason of the fact that there was no market value

for said machinery at that time or place, and by reason of the use that the defendant could have put it to, the said machinery was worth *to him* the sum of $8,000.00.

It has been said that the waiving of a tort and suing in contract must ordinarily be beneficial to the defendant, rather than prejudicial to him,

1 C. J., page 1033, Sec. 158, note 20.
Newton Mfg. Co. vs. White, 53 Ga. 395.
Elwell vs. Martin, 32 Vt. 217.
Smith vs. Schulenburg, 34 Wis. 41.
Hinds vs. Tweddie, 7 How. Pr. 278.

In the latter case, the Court says: "it would be difficult to find a case in which the defendant would be prejudiced by a waiver of the tort and resorting to the implied contract."

Yet here we have a case involving property which cost three thousand dollars and in which, if the defendant had not waived the tort, he could not counterclaim, but he alleges that he WAIVES THE TORT AND ELECTS TO SUE UPON THE IMPLIED CONRACT TO PAY FOR THE GOODS, and proceeds to plead in tort; his answer and counterclaim sounds in tort; is alleged in tort; the measure of damages prayed for is in tort. The Court has considered it in tort and has allowed damages in tort, five thousand dollars more than the cost of the property taken, all in the name of an action *ex contractu.* Damages, speculative, contingent and uncertain in their nature; an arbitrary amount of

damage to the defendant. Could anything be more prejudicial to any litigant in the waiver of a tort.

> "The rule is well settled that where personal property has been wrongfully taken and converted into money or money's worth, the owner may waive the tort and sue the wrongdoer in contract for money had and received, upon the theory that he ratifies the sale as made for his benefit, and sues to recover the proceeds as money had and received to his use."
>
> 1 C. J., page 1033, Sec. 159; notes 24, 25, 26 and many cases there cited.
>
> Page on contracts, Sec. 841.

and upon this theory, the defendant, if allowed to counterclaim, should be confined to the amount received by the plaintiffs for the property, which was the sum of $550.00 and which amount was applied by plaintiffs to the credit of the defendant on the account which he owed them.

> "Where goods have been converted and sold, and the owner waives the tort and sues for the money, the measure of damages is the amount of money received, and not the amount of damage done. Waiving the tort waives all right of recovery, beyond the amount received."
>
> Steam Stone Cutter vs. Sheldons, 15 Fed. 608.
>
> Huginir vs. Cotter (Wis.), 78 N. W. 423, 72 A. S. R. 884.
>
> Fanson vs. Linsay (Kan.)

Again—in tort actions—

> "Ordinarily the measure of damages for the loss or destruction of property is its market value, if it has a market value, and in such a case, no recovery can be had on the basis of its value individually, apart from its market value; * * * * If the market value would not be a fair compensation to the plaintiff for his loss, he has sometimes been permitted to recover the value to him based on his actual money loss (the price thereof).
>
> 8 R. C. L., pages 487, 488.
>
> And "it has been held that where one is permitted to waive a tort and sue on an implied contract, his recovery is limited to the amount of the defendant's gain or enrichment by the transaction in question, and hence, in such a case, he cannot recover for loss of profits."
>
> 8 R. C. L., page 503, Sec. 62, note 4.

The property involved in this case consisted of hydraulic pipe and mining equipment; something that could be bought on the open market every day of the year, and as appears from the pleadings and not controverted anywhere, plaintiffs had this pipe in their possession two years before they sold it; the defendant knew where it was all of this time but made no effort to reclaim it, nor did he go near plaintiffs during all of said time, but allowed the plaintiffs to sell the same without protest.

It will be remembered that the action was tried by the court in the absence of counsel for either party, but there was no testimony adduced to show

the cost of the property in question; this was alleged in defendant's original answer and counterclaim, to which the Court's attention was often invited; in the motion to strike the pleading; in the demurrer to the later pleadings; showing the invoice price to be $1,955.00 and the freight to "Supply Point" to be $1,045.00; a total of $3,000.00, and applying the most liberal construction to the defendant's case, he should not have been allowed to recover more than that amount.

The measure of damages allowed by the Court was the value *to defendant* of the property. We contend that this property cannot come under that class of property having a peculiar value to the party; such as heirlooms, documents, maps, plans, oil paintings, family portraits, etc., and in speaking of the rule governing these cases, it is said:

> "The measure of damages for the loss of destruction of this class of property which has no market value has been stated to be its reasonable worth, WHICH IS ACTUALLY BASED UPON THE COST OF ITS REPRODUCTION; if not, then its actual value to the owner, taking into account its cost and other considerations which affect its value to the owner, WHICH MUST NOT BE ANY FANCIFUL PRICE which he might, for special reasons place upon it."
>
> Note to Southern Express Co. vs. Owens, 8 L. R. A. (N. S.) 369; also, see, Southern Express Co. vs. Owens, 8 L. R. A. (N. S.) 375, 376;

Doyle vs. Eccles, 17 U. C. C. P. 644;
Adams Express Co. vs. Hoeing, 9 Ky. L. R. 814;
Mather vs. Amer. Exp. Co., 138, Mass. 55; 52 Am. Rep. 258;
Green vs. Boston & L. R. Co., 128, Mass. 221; 35 Am. Rep. 370;
Louisville & N. R. Co. vs. Stewart, 78 Miss. 600, 29 So. 394;

all of the above cases being actions in tort, and involving the loss or destruction of the class of property last above mentioned.

The foregoing argument is based upon the assumption that the plaintiffs were wrongdoers, but they earnestly contend they were not wrongdoers; it is true, they took possession of the defendant's pipe; it is true they eventually sold it, but it is also true that they took it to save it from destruction and loss and to protect their account against the defendant. The reason of their taking of the property has not been considered by the court, nor is the fact that *that* the proceeds of said sale was applied to the credit of the defendant on his account with plaintiffs. The Court has treated the action as one in tort and has allowed the defendant a profit of $5,000.00 on his property. This is nothing more or less than damages in tort.

It is evident that the Court based the value of the property on the fact that the defendant says he was forced to abandon his mining venture; but even if such was the case (which was denied), then such

damage would be altogether too remote; too uncertain; too speculative to be considered or allowed in this case.

"Anticipated profits cannot be recovered where they are dependent upon uncertain or changing conditions, such as market fluctuations, or the chances of business, or where there is no evidence from which they may be intelligently estimated."

17 C. J., pages 787, 788, notes 64, 65, 66.
17 C. J., pages 790, 791, notes 73.

To the same effect is

Note V, 52 L. R. A. 42, 43.
8 R. C. L., page 510, Sec. 69.

"Compensation for actual loss sustained is the fundamental principle upon which the allowance of damages is based, and allowance will not be made in an action for breach of contract * * * * upon a calculation of speculative profits.

Medbury vs. N. Y. & E. R. Co., 26 Barb. 564.

ASSIGNMENT OF ERROR No. 9.

The Court erred in finding as a fact, that certain allegations contained in paragraph 2 of said Findings of Fact, commencing on line 34 of page 3 thereof and continuing as follows to the end of said findings, to wit:

"and he is entitled to counterclaim that amount with interest thereon at 8% per annum from Sept. 1, 1921, as against the debt owing by him to the plaintiffs."

for the reason that such damages sound in tort and are not a proper counterclaim to the plaintiff's complaint under the laws of Alaska.

The argument heretofore advanced is also submitted with regard to this assignment of error; it is further submitted that as the tort was not waived until the filing of the defendant's answer and counterclaim in this action, there was no implied promise to pay anything until that time, and therefore no interest could commence to run before the time of such waiver; such interest, if any, should date, if at all, from the time of the election and not from the time of the alleged conversion.

Dougherty vs. Chapman, 29 Mo. App. 233.

And if the Court considers interest from the time of the conversion, it is further proof that he considered and treated the action as one in tort and not in contract, and the same is therefore not allowable as a counterclaim in this action under the laws of Alaska.

ASSIGNMENT OF ERROR No. 10.

The Court erred in concluding as a matter of law that the defendant H. W. Reeth is entitled to recover of and from the plaintiffs the sum of $3,789.79 and the costs and disbursements of this action, for the reason that such conclusion is not warranted by the facts of the case nor the law pertaining thereto, and that such amount is not a proper counterclaim against the plaintiff's complaint, nor did it arise out of the same transaction sued upon by plaintiffs.

The argument advanced in support of assignment of error No. 8 is respectfully submitted in support of this assignment.

ASSIGNMENT OF ERROR No. 11.

The Court erred in overruling plaintiff's objections to said conclusions of law as set forth in paragraph 3 of plaintiff's objections to the defendant's proposed findings of fact and conclusions of law, as follows:

> "3.—Plaintiffs object and except to the proposed conclusions of law for the reason that the said conclusion is not law, and is without basis or warrant in law."

The argument advanced in support of assignment No. 8 is respectfully submitted in support of this assignment of error.

ASSIGNMENT OF ERROR No. 12.

The Court erred in refusing to allow and adopt paragraph 1 of plaintiff's proposed conclusions of law, as follows:

> "1.—That the defendant's alleged counterclaim is not one arising out of the contract or transaction set forth in the complaint as the foundation of plaintiff's claim; nor is it one arising on contract, but is purely a right of action in tort, and is not allowable as a counterclaim under section 896 of the compiled laws of Alaska."

for the reason that such proposed conclusion is the proper law governing this action and should have been adopted by the Court.

A perusal of the counterclaim itself must show that it sounds in tort and not in contract; notwithstanding the tort is expressly waived by the pleader, the wrong complained of is set out in most vigorous language, and the damages claimed and demanded are even more than in the ordinary action of conversion. He SAYS he waives the tort, but he does NOT waive it, and the allegations of the pleader, taken and construed together, show conclusively that his pleading is in tort and not a proper subject of counterclaim under the Alaska statute. Plaintiff's previous argument herein is respectfully submitted in support of this assignment of error.

ASSIGNMENT OF ERROR No. 13.

The Court erred in refusing to adopt and allow paragraph 2 of plaintiff's proposed conclusions of law, as follows:

> "2.—That taking into consideration the plaintiff's 28 causes of action and the credit set forth in plaintiff's reply, together with interest thereon, there is now due and owing from the defendant to the plaintiffs the sum of $8190.21, and that the plaintiffs are entitled to judgment against the defendant for said sum, and for their costs and disbursements in this action."

for the reason that such conclusion of law is borne out by the pleadings and the evidence and is the proper law governing the case.

Plaintiff's twenty-eight causes of action are fully admitted by the answer of the defendant, and his counterclaim is not one contemplated by the Alaska statute; therefore plaintiffs should have judgment against the defendant according to the prayer of their complaint.

ASSIGNMENT OF ERROR No. 14.

The Court erred in giving and entering judgment in this action against plaintiffs, for the reason that the facts alleged in plaintiff's complaint are admitted by the defendant; that the counterclaim set out in the defendant's second amended answer and counterclaim sound in tort, that such counterclaim did not arise out of the same transaction sued upon as the basis of plaintiff's claim, nor is it one arising in contract, and is not a proper subject of counterclaim under the laws of Alaska.

The argument hereinbefore submitted in support of the former assignments of error, is respectfully submitted in support of this assignment of error.

ASSIGNMENT OF ERROR No. 15.

The Court erred in overruling plaintiff's motion for a new trial, for the reason that the pleadings in said action and the evidence adduced thereon and admitted by the Court to sustain the counterclaim of the defendant, "was not sufficient to justify a judgment in favor of the defendant, and that such judgment was erroneous in law, as well as in fact."

Plaintiffs earnestly contend that there has been a great miscarriage of justice in this case; they have been treated as wrongdoers of the worst type. Of course, the motive of a defendant in a tort action is usually not considered in the matter of damages, except as to maliciousness. There is practically no dispute as to the facts of the case. It is admitted by the defendant that he owed the plaintiffs the amounts alleged in the complaint; it is admitted by the plaintiffs that they took into their possession the pipe and equipment belonging to the defendant, and that after keeping it two years, they sold it and applied the proceeds of the sale to the account of the defendant. They admit that they received $550.00 for the property. They allege and it is not denied that they informed the defendant when they took possession of the property and why they did so. The defendant does not deny or controvert these facts, and the Court has not considered them. Notwithstanding, the defendant in his pleading says he waives the tort and elects to rely upon the implied contract for the value of the goods, he pleads the tort and asks damages for the unlawful taking. He does not ask for the market value, but lays a foundation in his pleading to show damage on account of his having to abandon his mining venture, and the Court has followed his lead, has considered and treated the action as in tort, and knowing from the original answer filed in the case which was referred to time and again in the arguments on demurrer, the true cost of the goods, still allows the

defendant the sum of five thousand dollars above such cost, why?, it must be as damages; speculative damages, far and away above the price of the property. Can anything be more certain or conceivable than that the Court has considered the action as one in tort. He has adopted a rule of damages applicable in actions of tort but not in contract.

Plaintiffs respectfully contend that it is not enough that the defendant should say that he waives the tort and elects to rely upon the implied contract created by the law to recover the value of the goods, he must plead in good faith, for the price of the goods, or for what the tort-feasor received for them. Instead of which he pleads an action in tort; lays the foundation for damages in tort, and claims damages in tort. The pleading, taken as a whole must, notwithstanding his waiver, be considered as a pleading in tort, and as such is not allowable as a counterclaim under our statute. It should not have been allowed to stand as a counterclaim in this action, and the plaintiffs should have been awarded judgment as prayed for in their complaint.

Plaintiffs have suffered great injustice by this judgment and respectfully ask that the same be reversed. No record of evidence has been submitted as we think the pleadings themselves, the Court's findings of fact, conclusions of law and judgment show for themselves that the Court has considered

and treated the action under the rules governing actions in tort and not in contract.

All of which is respectfully submitted.

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Due service of the foregoing brief, by receipt of a copy thereof is hereby acknowledged this thirtieth day of April, A. D. 1929.

LOUIS K. PRATT,
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